Supreme Court, U.S.
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No. 96-568

In The

Supreme Court of the United States

October Term, 1996

JOSEPH ONCALE,

Petitioner,

v.

SUNDOWNER OFFSHORE SERVICE, INCORPORATED; JOHN LYONS; DANNY PIPPEN; AND BRANDON JOHNSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Congress prohibited same-gender harassment when it enacted Title VII of the Civil Rights Act of 1964.

2. Whether an employee may assert a Title VII sexual harassment claim against his employer without proving that one gender was selected for disparate treatment.

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BRIEF IN OPPOSITION

Respondents file this Brief in Opposition and request that the Court deny the petition for writ of certiorari.

STATEMENT OF THE CASE

Procedural History. This is an appeal from a final order granting summary judgment in favor of Respondents. Petitioner, Joseph Oncale ("Oncale"), filed this one-count action against his employer, Sundowner, his male supervisor, John Lyons, and two male co-workers, Danny Pippen and Brandon Johnson, alleging sexual harassment under Title VII of the Civil Rights Act of 1964. Respondents moved for summary judgment. The district court granted summary judgment for Respondents, holding that same-gender harassment was not actionable under Title VII and that Oncale's co-workers could not be held liable as employers under Title VII. Oncale appealed the judgment to the Fifth Circuit, which affirmed in a published opinion. *Oncale v. Sundowner Offshore Services, Inc.*, 83 F.3d 118 (5th Cir.), *petition for cert. filed*, 65 U.S.L.W. 3310 (U.S. Oct. 10, 1996) (No. 96-568).

Fact Statement. For three months in 1991, Oncale worked as a roustabout on Sundowner's offshore rig in the Gulf of Mexico. No females worked on the rig. Lyons was the crane operator, and therefore was Oncale's supervisor. Pippin and Johnson also worked on the rig but had no supervisory authority over Oncale.

During his employment on the rig, Oncale claims to have been sexually harassed.[1] He bases his claim on three specific events. First, Oncale alleges Lyons placed his penis on Oncale's arm and the back of his head while Pippin and Johnson restrained him. Second, Oncale alleges Pippin lifted Oncale in the shower to allow Lyons to rub a bar of soap "between the cheeks of [Oncale's] behind." Finally, Oncale alleges Lyons and Pippin threatened to have sex with Oncale while the prior two incidents occurred. These incidents occurred on October 25, 1991. Oncale quit fourteen days later.

Correction of Misstatements in the Petition. In his Petition for Writ of Certiorari, Oncale makes misstatements of fact which should be called to the Court's attention. Such misstatements of fact include:

1. Oncale states that Pippen had *de facto* control over him. This is not true. The district court specifically found that Pippen and Johnson were not Oncale's employer under Title VII. *See* Petition, Appendix D at 14-15 & n.4. The Fifth Circuit did not address this issue in its opinion.

2. Oncale attempts to sensationalize the facts by stating that John Lyons "forced a bar of soap into Mr. Oncale's anus. . . . " *Petition* at 5. The record does not support this statement. Oncale described the event differently in his deposition testimony and in his sworn statement given on December 5, 1991. (R. at 44, 125). Both statements recounted that Lyon "rubbed it between the cheeks" of Oncale's buttocks.

[1] Respondents vehemently deny that any harassment took place. Nevertheless, because this case was resolved by summary judgment, all well-pleaded allegations will be treated as true.

REASONS FOR DENYING THE WRIT

This appeal does not involve a determination of whether the alleged sexual harassment was appropriate – if true, the conduct would be reprehensible and Louisiana law would find it actionable. That is beyond dispute. The question presented by this case, however, is whether Title VII of the Civil Rights Act of 1964 does so as well.

I. The Fifth Circuit correctly held that Oncale did not have a Title VII claim.

No rationalization justifies ignoring both the language and the historical purpose of an unambiguous statute. Yet, that is precisely what Oncale asks this Court to do. Through Title VII, Congress prohibited discrimination against an individual based on certain enumerated characteristics – race, color, religion, sex or national origin. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988). These enumerated prohibitions were designed to eliminate certain historical bases of prejudice from the work place so as to ensure an "equal employment opportunity." *Connecticut v. Teal*, 457 U.S. 440, 448 (1982). Providing an equal employment opportunity for historically disadvantaged groups, however, does not require a blanket prohibition against all forms of work place harassment. *See Ashworth v. Roundup Co.*, 897 F. Supp. 489, 491 (W.D. Wash. 1995). Likewise, the fact that

the harassment has sexual overtones does not automatically make it discrimination on the basis of sex. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985).

Oncale's argument confuses sexual harassment and gender discrimination. Congress has never passed a law specifically outlawing sexual harassment. *Plakio v. Congregational Home, Inc.*, 902 F. Supp. 1383, 1392 (D. Kan. 1995). "Sexual harassment is illegal because and only because it is a form of gender discrimination under Title VII." *Id.* (citation omitted). Although it is true that one can be the victim of gender discrimination without being a victim of sexual harassment, the reverse is not true: "One cannot be the victim of actionable sexual harassment if one is not a victim of gender discrimination." *Vandeventer v. Wabash Nat'l Corp.*, 887 F. Supp. 1178, 1181 (N.D. Ind. 1995). Without gender discrimination, "there can be no actionable sexual harassment." *Id.* And gender discrimination occurs only when the victim can prove that discrimination would not have occurred but for the victim's gender.

Despite Oncale's assertion that same-gender harassment is sex discrimination, the statutory language of Title VII, its legislative history, and the policy behind the statute indicate otherwise. If the Court extends Title VII liability to include same-gender harassment, the decision would affect far more than just Oncale. To hold that Title VII encompasses same-gender conduct would take the judiciary out of the traditional role of interpreting and reviewing a statute and into the role of legislating. *See Ulane*, 742 F.2d at 1086; *Hopkins v. Baltimore Gas and Elec. Co.*, 77 F.3d 745, 755 (4th Cir.) (Wilkinson, J., concurring in part), *cert. denied*, 117 S.Ct. 70 (1996). Congress has

spoken through the language it chose. Because Title VII addresses gender discrimination only, a male's harassment by a supervisor of the same gender cannot state a claim despite sexual connotations. Unless a plaintiff alleges facts that would indicate that he was the harassed because he was male, he does not state a claim under Title VII.

Congress enacted Title VII for a limited purpose. It meant to combat the injustice caused by class-discrimination – that is, discrimination against women for no reason other than their gender. Despite any temptation to award Oncale a remedy based on abstract notions of justice, the protections of Title VII should not be extended beyond its plain language and congressional intent. *See Price Waterhouse v. Hopkins*, 490 U.S. 288, 295 (1989) ("[a]ttempts to evade tough decisions by erecting novel theories of liability are misguided."). To extend protection to Oncale's claim – where a male employee claims to have been sexually harassed by his male supervisors in an all-male environment – not only trivializes Title VII's important purpose, but it also ignores Title VII's limited scope. Federal law cannot solve all problems that may occur in the work place and it was never meant to. The Fifth Circuit's ruling was correct.

A. Title VII does not expressly prohibit same-gender harassment.

Title VII of the Civil Rights Act of 1964 provides in pertinent part:

> It shall be an unlawful employment practice for an employee . . . to fail or refuse to hire or to

> discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin. . . .

42 U.S.C. § 2000e. In the context of Title VII's prohibition against discrimination, sex means "membership in a class delineated by gender." *DeCintio v. Westchester County Medical Ctr.*, 807 F.2d 304, 306 (2d Cir. 1986), *cert. denied*, 484 U.S. 825 (1987). "[B]ecause of . . . sex" means that "it is unlawful to discriminate against women because they are women and against men because they are men." *Ulane*, 742 F.2d at 1085.

Oncale attempts to shift the focus by placing undue emphasis on this Court's choice of words in two recent cases allowing sexual harassment claims. *See Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 370 (1993) (referring to "victims" of sexual harassment and applying a "reasonable person" standard); *Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (referring to discrimination "because of a subordinate's sex"). Oncale claims the language in *Harris* and *Vinson* is purposefully "gender neutral" and this somehow overcomes the absence of specific language in Title VII authorizing same-gender harassment claims. This argument, however, ignores the fact that both *Harris* and *Vinson* dealt with sexual harassment claims involving members of opposite sexes. There was no need for the Court to address the same-gender harassment issue and nothing should be read into the language that was not justified by the facts of those cases. *Harris* and *Vinson* did not address the same-gender harassment

issue simply because the question was not before the Court in either case. Gender neutral language merely allows for a male or a female to initiate harassment under Title VII. Gender neutral language in traditional sexual harassment cases cannot be used as a substitute for congressional authorization of same-gender harassment in Title VII.

The words of Title VII are expressly limited to certain enumerated categories of prohibited conduct in the work place. And "federal courts must accept Title VII in the same version as passed, no matter how grudging the acceptance. . . . " *Torres v. National Precision Blanking*, No. 96-C-776, 1996 WL 587556, at * 7 (N.D. Ill. Oct. 7, 1996). "[B]ecause of . . . sex" in Title VII means because of gender. Even language in *Harris*, though arguably couched in gender neutral terms, shows that Title VII would not prohibit same-gender harassment. In fact, Justice Ginsburg, in her concurrence, regarded "[t]he critical issue, Title VII's text indicates, [as] whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the *other sex* are not exposed." *Harris*, 114 S. Ct. at 372 (Ginsburg, J., concurring) (emphasis added).

Although discrimination "because of . . . sex" has been interpreted to include sexual harassment, Title VII's fundamental purpose, as evidenced by the express language, was to remedy historical injustices certain groups faced in the work place. Even though same-gender discrimination can be a form of "sexual harassment," the simple truth is that such discrimination is beyond the reach of Title VII. Going beyond the statute's parameters

amounts to judicial legislation – providing a right Congress did not choose to establish in the language of Title VII. Since Congress did not prohibit same-gender harassment, summary judgment was proper.

B. No legislative history suggests that Congress intended to address same-gender harassment.

Title VII was enacted to rectify the injustice by class-based discrimination – namely, discrimination against African-Americans for no reason other than their race. This country's history of discrimination against African-Americans was well documented and was most evident in the work place. 110 Cong. Rec. 6548 (daily ed. Mar. 30, 1964). Congress enacted Title VII in an attempt to overcome this prejudice. 110 Cong. Rec. 6549 (daily ed. Mar. 30, 1964) (statement of Sen. Humphrey). Congress wanted to eliminate all vestiges of historical discrimination and it viewed Title VII as a way of accomplishing that laudable goal. *Id.*

Unlike provisions prohibiting discrimination based on race, color, religion, and national origin which were included in the bill from the outset and were hotly debated, the prohibition against sex discrimination received little legislative attention. Robert S. Miller, Jr., *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 880 (1967) ("The heated debate [of the Civil Rights Act] on the House floor lasted nearly two weeks, but 'sex' discrimination was not considered until the day before the passage of the Act."). In fact, the legislative history shows that the House amendment adding the word "sex" to Title VII was an eleventh hour attempt to defeat the entire Civil Rights Act of 1964.

Ulane, 742 F.2d at 1085 (quoting *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977), *see also* 110 Cong. Rec. 2577 (daily ed. Mar. 30, 1964) (statement of Rep. Smith).

Congress was not concerned about the evils of same-gender harassment at the time it enacted the Civil Rights Act of 1964. The scant legislative discussion about sex discrimination in 1964 focused on discrimination against women. Robert S. Miller, Jr., 51 MINN. L. REV. at 880. This "traditional concept of sex" was all that concerned Congress in 1964. *Ulane*, 742 F.2d at 1084. Title VII's prohibition against sex discrimination "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women.' " *Vinson*, 477 U.S. at 64 (quoting *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). It does not, as Oncale suggests, evince any congressional intent to address same-gender harassment.

The legislative history has no indication that Congress provided a cause of action for an employee who claims to have been the victim of sexual harassment by a supervisor or co-worker of the same gender. Oncale argues that silence on this point is enough. It is clearly not. Title VII was enacted to eliminate all vestiges of class-based discrimination. Without clear legislative intent to the contrary, that protection should not be extended. The Fifth Circuit properly restricted the application of Title VII to those situations where the legislative history indicates that Congress intended it would apply.

C. This Court should not create a new cause of action because same-gender harassment is inherently different from harassment "because of . . . sex."

By definition, discrimination occurs when someone is harmed or denied a benefit solely because that person is a member of a group that the discriminator despises. Ellen Frankel Paul, *Sexual Harassment As Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 352 (1990). A same-gender harassment claim cannot constitute discrimination "because of . . . sex" since

> what the harasser is really doing is preferring or selecting some one member of his [own] gender for sexual attention, however unwelcome that attention may be to its object. He certainly does not despise the entire group, nor does he wish to harm its members, since he is a member himself and finds others of the group sexually attractive.

Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1337 n.1 (D. Wyo. 1993) (*citing* Ellen Frankel Paul, 8 YALE L. & POL'Y REV. at 351-52). Same-gender harassers do not despise members of their own gender. *Id.* Same-gender harassers are motivated, not by animus, but by libido. *See King v. Board of Regents of Univ. of Wis. System*, 898 F.2d 533, 539 (7th Cir. 1990). Harassment "based on sexual desire is not based on gender," and therefore, is not actionable. *Id.*

D. This Court should not create a cause of action for same-gender harassment because state law already protects employees, like Oncale, who claim to have been harassed by supervisors of the same gender.

If the alleged facts are true, they would be actionable under Louisiana law.[2] Instead of availing himself of the numerous causes of action under Louisiana law, Oncale chose to file a one-count complaint under Title VII. The conscious decision to forego state law causes of action cannot be confused with a lack of available remedies.

Louisiana law offered many options to Oncale. Article 2315 of the Louisiana Civil Code provides a cause of action for all intentional torts. Based on the allegations in the Complaint, Oncale may have asserted a state law tort claim against Lyons, Pippin, and Johnson for any intentional tort, including assault and battery, false imprisonment, or intentional infliction of emotional distress. Oncale may have asserted a state law tort claim against Sundowner for assault and battery. *See Emoakemeh v. Southern Univ.*, 654 So.2d 474, 477 (La. App. 1995) (holding university accountable for sexual battery by resident assistant under a vicarious liability theory). Article 2315 of the Louisiana Civil Code provides a cause of action for all negligent torts. Oncale may have asserted a negligent

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[2] Louisiana state law would apply because the permanent offshore rig was in Louisiana's territorial waters. *See Chevron Oil Co. v. Huson*, 404 U.S. 97, 99 (1971) (applying Louisiana statute of limitations to claim arising in Gulf of Mexico); *see also* Outer Continental Shelf Land Act, 43 U.S.C. § 1333(a)(1) (1988).

retention or supervision claim against his employer if he could prove Sundowner knew or should have known of the alleged harassers' propensity to engage in sexual harassment and failed to address the conduct. Additionally, Article 1031 of the Louisiana Workers' Compensation Act provides a cause of action to workers for certain on-the-job injuries. Apart from civil remedies, if the allegations were true, the State of Louisiana could have prosecuted Lyons, Pippin, and Johnson for attempted rape, attempted sodomy, or sexual assault and battery.

State law, not Title VII, should be used to address claims for same-gender harassment in the work place. There is no reason to expand the scope of coverage to include a cause of action for same-gender harassment when the States already address those concerns.

II. Even if this Court were inclined to recognize a cause of action for same-gender discrimination, Oncale is not the appropriate case to make that pronouncement.

Even assuming that same-gender discrimination is actionable under Title VII, Oncale must establish that the alleged discrimination was on the basis of Oncale's gender. *See Meritor Savs. Bank*, 477 U.S. at 66-67. Specifically, Oncale must demonstrate that he was the object of the alleged sexual overtures because he was male. A showing that the harassment complained of occurred "because of" his sex is an indispensable element in a case of this type. *Swentek v. USAIR, Inc.*, 830 F.2d 552, 558-59 (4th Cir. 1987); *Henson v. City of Dundee*, 682 F.2d 897, 903-04 (11th Cir. 1982). Thus, to have withstood summary judgment, Oncale was required to have introduced sufficient evidence from which a jury could have reasonably found that "but for his being male, he would not have been treated by his co-workers in the manner that he was." *Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135, 138 (S.D. Tex. 1993).

Oncale has not made this threshold showing. Here, the record offers no basis to find that Lyons, Pippin and Johnson chose Oncale because of his gender or treated men and women differently on the basis of their gender. Oncale worked in an all male environment. It is impossible to determine how Lyons, Pippin and Johnson would have treated similarly situated women because no women worked on the rig. Oncale fails to show that "there existed a causal connection between the gender of the individual or class and the resultant preference or disparity," *DeCintio*, 807 F.2d at 307. For these reasons, his Title VII claim must fail.

A. Oncale worked in an all-male environment so he could not prove gender-based discrimination.

A sexually hostile, abusive, or oppressive workplace does not necessarily implicate Title VII. *Fox v. Sierra Dev. Co.*, 876 F. Supp. 1169, 1175 (D. Nev. 1995). The purpose of Title VII is to provide individuals with "an environment free from discriminatory intimidation, ridicule, and insult." *Meritor Savs. Bank*, 477 U.S. at 65. This Court has distinguished a merely abusive or hostile environment from one that is "discriminatorily" abusive or hostile. *See*

Harris, 114 S. Ct. at 370 (referring throughout to a "discriminatorily" abusive or hostile environment). Although the alleged behavior in this case may be considered reprehensible if true, it is not actionable under Title VII because the conduct is not gender discrimination.

Oncale cannot, as a matter of law, prove that he was selected for harassment because of his sex. He cannot show that, "but for his being male, he would not have been treated by his co-workers in the manner that he was." *Polly*, 825 F. Supp. at 137. Oncale cannot meet this "but for" requirement because he worked in an all-male environment. He has not and cannot allege facts which would support the notion that Sundowner, Lyons, Pippin and Johnson allowed and maintained a work environment that treats males as inferior, in contrast to the way it treats females. No females worked on the offshore platform. Sundowner, Lyons, Pippin and Johnson could not create nor foster anti-male sentiment in the workplace. Therefore, Oncale cannot show that he was singled out for different treatment on the basis of his sex. "If the nature of an employee's environment, however unpleasant, is not due to . . . gender, [he] has not been the victim of sex discrimination as a result of that environment." *Stahl v. Sun Microsystems, Inc.*, 19 F.3d 533, 538 (10th Cir. 1994).

To avoid this problem, Oncale suggests that the sexual orientation of Lyons, Pippin and Johnson should be open to litigation. Oncale makes this argument because the few employees who have prevailed in same-gender sexual harassment claims have done so by alleging and

proving that the supervisor was homosexual. *See, e.g., Wrightson v. Pizza Hut of America, Inc.*, No. 96-1127, 1996 WL 628257 (4th Cir. Oct. 31, 1996). Even the Fourth Circuit did not make sexual orientation an issue because in *Wrightson*, that issue was uncontested – the harassers were admitted homosexuals. 1996 WL 628257 at *1. Yet, even if this Court chooses to regard sexual orientation as something a fact-finder should determine, no evidence suggests that Lyons, Pippin or Johnson are homosexual. Plaintiff admitted to an EEOC investigator that he does not know or believe that Lyons, Pippin or Johnson are homosexuals. *See* (R. at 97). Oncale also admitted that Lyons and Pippin are married to women. (R. at 97). Oncale offered no summary judgment evidence to refute either of his prior statements.

Oncale argues, in effect, that because the underlying acts were directed to members of the same gender, that fact, and that fact alone, gives rise to an inference that Respondents are homosexual. If this line of inquiry is allowed, future cases of this type will turn on the question of the sexual orientation of the alleged perpetrator. Federal courts, however, should not be in the business of determining a person's sexual orientation. Under Oncale's argument, a plaintiff could go to the jury any time he alleged that the harasser was homosexual. If the harasser is not homosexual, there could be no recovery. If the harasser is bi-sexual, there could be no recovery. How are the courts to determine whether a person is homosexual when that issue is contested? Will the EEOC propose a uniform set of guidelines to assist the courts in resolving this inquiry? Such a notion is certainly inconsistent

with the language and purpose of Title VII, which is to address class-based discrimination.

If this Court were to adopt Oncale's position, disparate treatment would no longer be an element of a sexual harassment claim. It could not be under Oncale's argument because no women worked on the offshore rig. This Court should reject such an absurd notion. Disparate treatment is what Title VII is all about. As this Court recognized, the critical inquiry in any sexual harassment claim is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Harris*, 114 S. Ct. at 372 (Ginsburg, J., concurring). Oncale has neither alleged nor proven that similarly situated women were treated differently. The Fifth Circuit properly rejected his claim.

B. The alleged harassment, if it were gender-based, did not create an anti-male environment.

Even if Oncale is able to prove he was harassed because he is male, he fails to state a Title VII claim because the alleged harassment did not create an anti-male environment, a necessary factor for Title VII recovery. *Goluszek v. H.P. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988). The purpose of anti-discrimination law is to provide equal opportunities for both men and women. *Id.*

Creation of an anti-male or an anti-female environment is essential to any Title VII claim.

> A claim for a sexually hostile working environment is not a trivial matter. Its purpose is to level the playing field for women who work by preventing others from impairing their ability to compete on an equal basis with men. One must always bear that purpose in mind.

DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 593 (5th Cir. 1995).

It is impossible to level the playing field in this case. There is not a gender-biased work environment resulting from the oppressive acts of a dominant gender – it is a one gender environment. *See Johnson v. Hondo, Inc.*, No. 95-C-866, 1996 WL 531937, *7 (E.D. Wis. Sept. 9, 1996). Because Oncale cannot show the creation of an anti-male environment, his claim must necessarily fail.

CONCLUSION

For these reasons, Respondents ask the Court to deny the petition for writ of certiorari.

Respectfully submitted,

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